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FILED
APR 26 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____ 76-1462

FLOYD H. DANIELS,

Appellant and Petitioner,

vs.

SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, a public corporation; and JACK R. GILSTRAP, as General Manager of the SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT,

Appellees and Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In Propria Persona

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In Propria Persona

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FLOYD H. DANIELS, *Plaintiff-Appellant,* vs. SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, a public corporation; and JACK R. GILSTRAP, as General Manager of the Southern California Rapid Transit District, *Defendants-Appellees.*	No. 76-2285 MEMORANDUM

[December 8, 1976]

Appeal from the United States District Court for the Central District of California

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Before: CHAMBERS, HUFSTEDLER, and SNEED, Circuit Judges.

The order appealed from in this case is not appealable and the appeal must be dismissed. On June 12, 1975, a judgment was entered in this case which denied a motion to vacate a prior judgment entered on the 24th of April, 1975, and adjudged that plaintiff take nothing by his complaint. This was a final judgment disposing of the action, and plaintiff has never appealed from it. Instead, nearly six months later, on December 15, 1975, the plaintiff filed a notice of motion and motion to vacate the judgment and a motion for leave to file an amended complaint, both motions supported by certain affidavits. On January 12, 1976, a minute order was entered denying both the motion to vacate the judgment and the motion for leave to file an amended complaint. Assuming, without deciding, that the motion to vacate the judgment was properly made under Rule 60(b)(2), plaintiff never appealed from the order denying that motion. Instead, on

January 21, 1976, plaintiff filed a new motion for leave to file an amended complaint. The proposed amended complaint is virtually identical to the one tendered with the December 15, 1975 motion. Because a final judgment had been entered against plaintiff and because the court had denied plaintiff's motion to set the judgment aside under Rule 60, the second motion for leave to file an amended complaint has no significance. A plaintiff cannot continuously extend the time within which to appeal from an order by refiling his motion and getting another order entered. To tolerate this type of procedure would destroy the finality of judgments. Consequently, the order that was finally entered on May 5, 1976, denying the January 21 motion for leave to file an amended complaint, was not an appealable order. This is the only order from which the plaintiff has taken an appeal, his notice of appeal having been filed on May 12, 1976. The order not being appealable, the appeal must be dismissed.

Appeal dismissed.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

December 8, 1976

RE: 76-2285, FLOYD H. DANIELS VS. SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, et al.

Dear Counsel:

An opinion was filed and a judgment entered in the above case today, Dec. 8, 1976, dismissing appeal.

You have (14) days, from the above date, in which to file a petition for rehearing.

The mandate of this court shall issue (21) days after entry of judgment unless the court enters an order otherwise. If a petition for rehearing is filed and denied, the mandate will issue (7) days after the entry of the order denying the petition.

Sincerely,

Emil E. Melfi, Jr.
Clerk of Court

See Rules: 36, 40 and 41 of the Federal Rules of Appellate Procedure.

CO 76.2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FLOYD H. DANIELS, Plaintiff-Appellant V. SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, et al., Defendants-Appellees.	)	No. 76-2285 ORDER

Before: CHAMBERS, HUFSTEDLER, and SNEED, Circuit Judges.

Appellant's petition for rehearing filed December 27, 1976 is DENIED.

Filed: February 7, 1977.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FLOYD H. DANIELS, Plaintiff, vs. SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, a public corporation, et al., Defendants.	)	NO. CV 75 290 EAC O R D E R

The Motion for Leave to File Amended Complaint of FLOYD H. DANIELS, having come on regularly for hearing on April 26, 1976, the Honorable E. Avery Crary, Judge presiding, Floyd H. Daniels appearing Impropria persona and Southern California Rapid Transit District and Jack R. Gilstrap appearing through Musick, Peeler & Garret, by Michael W. Conlon, and the matter having been argued and submitted:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Leave to File Amended Complaint is denied. The action was dismissed on April 24, 1975.

DATED: This 5th day of May, 1976.

E. Avery Crary

JUDGE , UNITED STATES DISTRICT COURT